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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

EX PARTE OR LATE FILED

In the Matter of

Inquiry Concerning High-Speed
Access to the Internet Over
Cable and Other Facilities

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GEN Docket No. 00-185 /

**EX PARTE REPLY OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
TO THE REPLY COMMENTS OF THE AMERICAN AUTOMOBILE ASSOCIATION**

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The Cellular Telecommunications & Internet Association ("CTIA")¹ hereby submits an ex parte response to the Reply Comments of the American Automobile Association ("AAA")² in the above captioned proceeding.³

I. INTRODUCTION AND SUMMARY

CTIA's comments in this proceeding urged the Commission, inter alia, to decline to impose access requirements or any other "duty to deal" obligation in the absence of a persuasive

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Reply Comments of the American Automobile Association, filed Jan. 17, 2001 ("AAA Reply").

³ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GEN Docket No. 00-185, *Notice of Inquiry*, FCC 00-355 (rel. Sept. 28, 2000) ("Notice").

demonstration of substantial and persisting market power. This is particularly important for nascent products such as wireless data services and other CMRS services, where the Commission has consistently relied upon competitive market forces, rather than government mandates, to stimulate the development of innovative services. This deregulatory approach has helped foster a dynamic, competitive CMRS marketplace that has experienced tremendous growth with reductions in prices and increases in quality.⁴ Unfortunately, but perhaps predictably, the Notice was seen by some commenters as an opportunity to seek regulatory intervention into competitive markets and services with a view to constraining the future development of such services in a manner beneficial to a specific commenter. That is precisely what AAA has done by urging the Commission: (1) to include the provision of “telematics”⁵ services in this proceeding; (2) to mandate open access in the telematics market (as well as a “wide range of telecommunications markets”); and (3) to prohibit exclusive contracts between providers of telematics services and the providers of inputs to that service, such as wireless services.⁶

The Commission should decline AAA’s plea for regulatory intervention. There is no principled basis for such intervention because neither the market for the service offered to consumers, nor the markets for any of the inputs to that service, are characterized by market power. Sales of automobiles, mobile phones, and personal digital assistants (“PDAs”) occur in

⁴ See generally Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report, FCC 00-289 (rel. Aug. 18, 2000) at 9-18 (“Fifth CMRS Competition Report”).

⁵ AAA defines “telematics” as “the integration of location technology and wireless communications to provide a variety of automotive and mobile applications.” AAA Reply at 2.

⁶ See AAA Reply at 13, 14.

competitive markets, as do the provision of wireless transmission services and the provision of automotive-related applications, such as those offered by AAA. Absent bottleneck control over an essential facility, no regulatory intervention is required or desirable. Allowing the marketplace to function without intervention is particularly important for innovative, nascent, and rapidly developing services such as telematics, where government action that has the effect of freezing or stifling the innovative process harms not only service providers and consumers, but the innovative process, and hence society itself. Without doubt the dynamic process of innovation that allows existing services to be provided in new ways and provides the platform for the development of new services is a daunting prospect for established and well-regarded providers such as AAA. However, as pointed out by Chairman Powell, the appropriate response to this challenge is for service providers to embrace and advance the innovative process, and not seek regulatory intervention to slow it down. In sum, the cost of mandating open access far exceeds any potential benefit of doing so.

II. REGULATIONS MANDATING OPEN ACCESS ARE INAPPROPRIATE FOR COMPETITIVE SERVICES AND ARE PARTICULARLY HARMFUL IN BUSINESSES CHARACTERIZED BY DYNAMIC INNOVATION.

A. Open Access Requirements Are Contraindicated In The Absence Of Market Power.

As a matter of law and policy, a regulatory mandate for open access must be grounded upon a finding that firms in the marketplace exercise substantial and persistent market power.⁷ In other words, in a competitive, dynamic environment where no firm exercises control over bottleneck facilities, open access obligations are ill-advised and unwarranted. Rather, the

⁷ See Notice at ¶ 41 (“We stress that, before we will take any regulatory action on this issue, we must first determine that open access is desirable as a policy matter and that market forces are insufficient to achieve this policy objective.”) (emphasis added).

Commission should be guided by the long-established and well-considered judicial precedent that a firm, absent persistent, substantial market power, should be free to choose whether to deal with another firm.⁸ As the Commission has previously found, a general duty to deal is imposed only where the service provider would likely abuse the public interest if no legal protection were extended.⁹ In this instance, without market power, neither the provider of telematics services, nor the providers of any input to that service, have either the ability or the incentive to discriminate or otherwise act anticompetitively in offering their services.¹⁰ Their only incentive is to provide the information products their subscribers most desire.

⁸ See U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . .”); U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (holding that judicial restrictions on motion picture film distributors were valid only after finding that film producers and film distributors had engaged in both horizontal and vertical restraints of trade). Similarly, monopolization or some effort to monopolize must be found before the Commission considers imposing restrictions on the ability of telematics service providers or automobile manufacturers to freely contract with providers of wireless telecommunications services or data and emergency service providers. See also U.S. v. Loew’s Inc., 882 F.2d 29, 33-34 (2nd Cir. 1989) (finding that the legal restrictions adopted in Paramount were no longer necessary (at least as applied to one entity) because the film distribution market had become highly competitive).

⁹ See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket 79-252, *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 522 (1981).

¹⁰ A duty to deal should be imposed only on a firm (or group of firms) that has a monopoly in the downstream market. Areeda & Hovenkamp, Antitrust Law, ¶ 736.2d (1993 Supp.); see Northwest Wholesale Stationers v. Pacific Stationary and Printing Co., 472 U.S. 284 (1985) (holding that a concerted refusal to deal is not illegal in the absence of market power); see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 (1985) (holding that even a firm with monopoly power has no general duty to deal so long as it is not improperly using its monopoly power with the intent of injuring rival firms).

Thus, the burden upon AAA and any other advocate of regulatory open access requirements is to demonstrate that due to the presence of substantial and persisting market power, the market needs government intervention in the form of imposing a duty to deal. AAA's submission does not carry this burden.

The gravamen of AAA's case for an open access requirement for providers of telematics services is that consumers have no choice among underlying providers of telematics services, other than by purchasing a particular automobile brand. AAA claims that this lack of choice is due to exclusive contracts effectively requiring that purchase of a particular brand of automobile locks the customer into a single equipment manufacturer, wireless telecommunications provider, "content provider," and provider of emergency road service.¹¹ This assertion is in many respects undercut by statements in the AAA Reply, and it fails to demonstrate market failure. Indeed, even if taken at face value, AAA's argument does not establish that any product or service provider relevant to telematics has bottleneck control over an essential facility (or otherwise has substantial and persisting market power), whether the product or service in question is offered directly to consumers (such as automobiles bundled with a telematics offering) or to product or service providers as inputs to the consumer product. Thus, consumers are not in fact "locked in" to a specific provider of telematics services by virtue of having selected a specific make of automobile but rather have alternatives; as nascent as the service is, both the provision of telematics and the service inputs required for telematics are competitive.¹²

¹¹ See AAA Reply at 2, 10, 11, 12 and 13.

¹² The very fact that by far the largest percentage of mobile phone subscribers use portable, handheld phones demonstrates the extent of the alternatives available to consumers. Mobile subscribers have the ability to contact the roadside assistance provider of their choice notwithstanding the services bundled with a telematics platform.

Even if one assumes that AAA's premise is correct—that the purchase of a particular brand of automobile denies consumers the ability to choose their equipment manufacturer, wireless carrier, content provider and emergency road service provider—this is not evidence of market power justifying regulatory intervention. “Tying” products in the manner described by AAA potentially raises competitive concerns only if the seller of the “upstream” product—the automobile—has market power in the sale of automobiles. In Town Sound and Custom Tops, Inc. v. Chrysler Motor Corp., the court found that the market for the sale of new automobiles to consumers is competitive.¹³ In the Town Sound decision the court considered claims that Chrysler tied sale of automobile sound systems to its sale of automobiles in violation of the Sherman Act and the Clayton Act. The court decided in favor of the defendant, holding that “[i]n sum, the competition in the automobile market adequately protects those consumers who consider autosound systems when buying their cars from having to pay too much. . . . because the automobile market is competitive, a consumer can demand compensation for taking a less desirable sound system in the form of a lower price for the vehicle or for optional features.”¹⁴ Competition in the market for the sale of new automobiles similarly protects potential automobile purchasers interested in telematics services. In these market circumstances, no manufacturer of automobiles has market power, much less bottleneck control over an essential facility. Manufacturers and their associated automobile dealerships therefore have the incentive to provide consumers the services and options they desire, and conversely, have no ability or

¹³ Town Sound and Custom Tops, Inc. v. Chrysler Motor Corp., 959 F.2d 468, 480-81 (3d Cir. 1992) (finding that Chrysler lacked market power in the sale of new automobiles in the U.S. and that the market for new automobiles is competitive).

¹⁴ Id. at 487-88.

incentive to deny consumers the services they desire. Other things being equal, consumers will choose to buy the automobile that best meets their desires and expectations. This is evidence of a robustly competitive market, not market failure.

In any event, AAA fails to carry its burden of demonstrating the presence of market power because its premise—that the purchase of a particular brand of automobile denies consumers the ability to choose their equipment manufacturer, wireless carrier, content provider and emergency road service provider—is incorrect. The provision of hardware platforms for telematics, the provision of wireless telecommunications services, as well as the provision of content and emergency road services are competitive. With respect to hardware platforms, AAA informs the Commission that "[h]ardware platforms may include in-vehicle devices, cell phones or personal digital assistants [PDAs]," and that "[a]t this nascent stage, there are numerous ways to assemble a successfully integrated telematics system. . . ." ¹⁵ Cell phones and PDAs by themselves offer several competitive hardware options to consumers; added to the in-vehicle hardware options available to consumers, the provision of hardware platforms that may be used for telematics is robustly competitive.

The provision of wireless telecommunications services also is competitive. In its most recent analysis of competition in the CMRS industry, the Commission concluded that more than seventy percent of U.S. consumers have a choice of at least five competing mobile phone providers, while eleven million people can choose from among seven different competing carriers. ¹⁶ Given the substantial number of wireless carriers operating in every market and the

¹⁵ AAA Reply at 7; see also id. at 9 ("[t]he same functionality will be available via portable devices such as cell phones and PDAs.").

¹⁶ Fifth CMRS Competition Report at 6.

vigorous competition for wireless customers, no single carrier possesses the power to engage in anticompetitive behavior. This is evidenced by the fact that “the average price of mobile telephony has fallen substantially [since 1999], continuing the trend of the last several years. According to one estimate, prices declined by approximately 8 percent during the last six months of 1999. . . . Another analyst estimates that prices fell by 20 percent between 1998 and 1999.”¹⁷ Such price competition in markets with five, six, or seven carriers is an irrefutable example of a workably competitive market.¹⁸ Moreover, with six predominantly nationwide carriers, along with smaller operations tailoring service offerings to local demands, the Commission can be sure that dynamic competition, both in prices and consumer services, will continue to flourish in this industry.¹⁹ Thus, providers of telematics services have numerous options from which to obtain wireless telecommunications services as a input.

Finally, as pointed out by AAA, there is no lack of competitive options with respect to content providers and providers of emergency road service. As stated by AAA, “service and content providers may include companies such as AAA, Disney, Yahoo!, Sprint PCS and

¹⁷ Id. at 19.

¹⁸ See 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*, 15 FCC Rcd 9219 at ¶ 30 (1999) (noting that “[i]f there are five competitors [in a market], the likelihood of a cartel falls [from 100 percent] to 22 percent.”).

¹⁹ See Fifth CMRS Competition Report at 10-11.

more."²⁰ Thus, each input to the provision of telematics services is subject to robust competition. Quite plainly, there is no essential facility for the provision of telematics; there is no bottleneck, and there is no market failure in either the availability of the telematics service itself or any of its inputs. There is, therefore, no principled justification for market intervention by the FCC in the form of an open access requirement.

B. Because Telematics Is A Nascent Service, FCC Market Intervention Would Be Premature And Is Contrary To Sound Public Policy.

In its reply, AAA acknowledges that telematics is a nascent service and that, even as a nascent service, "there are numerous ways to assemble a successfully integrated telematics system, and the optimal solution for today's technology may change over time as mobile technology develops and converges."²¹ As explained above, both telematics and its inputs are competitive services and there is no market failure impediment to the future development of telematics. Products and services in these circumstances are understood by the Commission to be particularly inappropriate objects of market intervention. As explained in the Notice, "[t]he Commission has shown regulatory restraint with respect to emerging services in a number of contexts. In the *Computer Inquiries*, for example, the Commission refrained from regulating data processing services, relying in part on the fact that the market for such services, while still nascent, was functioning in a competitive manner."²² This same rationale applies to telematics.

²⁰ AAA Reply at 7.

²¹ Id.

²² Notice at ¶ 11; see "Broadband Cable: Next Steps," Address of William E. Kennard, Chairman, FCC, before the Western Show; California Cable Television Association (Dec. 16, 1999) ("There are two choices: we can rely on the market to facilitate openness; or we can try to regulate our way there. For now, I'm putting my faith in the marketplace. Unless a compelling case can be made for government action - a failure of the market to

Because it is a nascent service, and because it is growing in a competitive market, the Commission need not consider applying market-distorting regulatory burdens on the provision of this service or its inputs.

Without doubt, the dynamic, innovative process of development of telematics referenced by AAA in its comments is a daunting prospect for AAA. It is natural for firms in the throes of dramatic changes in the manner in which customers access their services to seek to slow that process down as a means of maintaining their market position. However, the Commission's role is not to protect market participants from competition. Indeed, FCC Chairman Powell has suggested that government regulation should promote competition through innovation, which he described as one of the “engines of prosperity.”²³ Chairman Powell further stated that “we have to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing market failure that justifies regulatory intervention.”²⁴ As demonstrated above, AAA's concern does not sound in market failure, but in fear of the unknown future of telematics services. While its concern is understandable, it is not a proper basis for regulation.

maximize consumer welfare - then we should give the marketplace a chance to work. That's particularly true with the deployment of new technologies. In the mid-1980's, when the telephone companies started to roll out ‘information services’ - the regulatory forerunner of the Internet - the FCC had the good judgment to allow the phone companies to deploy information services in an unregulated environment. Without that decision to exercise restraint and let the market develop, the Internet as we know it would not exist.”) (emphasis added).

²³ “The Great Digital Broadband Migration,” Remarks of Michael K. Powell, Commissioner, Federal Communications Commission, before the Progress and Freedom Foundation, Washington, D.C. (Dec. 8, 2000) (as prepared for delivery).


²⁴ Id.

III. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission decline to entertain AAA's request for rules mandating open access for telematics.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION**

A handwritten signature in black ink, appearing to read "Michael F. Altschul", written over a horizontal line.

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